Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
	)	
Regulatory Treatment of Mobile Services	)	

U S WEST REPLY

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November 23, 1993

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Summary of U S WEST's Reply

A review of the comments filed in response to the Notice makes clear that the debate surrounding the appropriate regulatory framework for commercial mobile services ("CMS") and private mobile services ("PMS") is limited in scope. The vast majority of commenters favor the adoption of a broad definition of CMS and a correspondingly narrow definition of PMS. The majority of commenters also agree that cellular, enhanced SMR and PCS should be classified as CMS; while non-profit public safety services, government mobile communications and mobile radio services operated by businesses solely for their internal use, should be defined as PMS.

The only area where there is any significant difference of opinion is the appropriate classification of remaining services, such as traditional SMR and paging. However, the opponents of CMS classification for these services have considerable difficulty squaring their arguments with the plain language of the statute, which defines a commercial mobile service as "any" mobile service that "is provided for profit and makes interconnected service available (a) to the public or (b) to such class of eligible users as to be effectively available to a substantial portion of the public."

In deciding these latter questions, the Commission should not adopt technical definitions of the terms "interconnected service" and "effectively available to the public" so as to differentiate services based on distinctions which have little or no basis in the marketplace. The Commission should also not establish a functional equivalency test which would, contrary to Congress' intent and the views of a majority of the commenting parties, re-align the demarcation line between the two new classes of mobile services in a manner which would broaden PMS and narrow CMS. The functional equivalency analysis should be based upon consumer perception rather than a licensee's use or lack thereof of a given technology (*e.g.*, frequency reuse). If consumers perceive a service to be the functional equivalent of a CMS service, then that service should be regulated as a CMS service. To do otherwise would be to frustrate the Congressional directive of regulatory parity.

The commenting parties overwhelmingly support the removal of the current dispatch prohibition on common carriers — action which even the opponents to this removal concede will result in lower prices and a larger array of services to the public. These same reasons support the elimination of the wireline SMR restrictions. In the end, <u>any</u> CMS provider should be free to offer <u>any</u> service, including PMS services. This will ensure that the market will not be deprived of the services they want and at the prices they would prefer.

The commenting parties are also nearly unanimous in their position that the mobile services market is competitive, thereby warranting maximum forbearance from Title II regulation of all CMS providers. Moreover, given the lack of consensus on any issues relating to "dominant carriers," the record simply does not justify the adoption of different levels of forbearance on different types of mobile services or mobile services providers.

Finally, there are numerous parties, including cellular carriers with experience under the past practices, who, along with U S WEST, recommend that the Commission apply its successful Part 22 interconnection framework to all CMS providers.

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U S WEST, Inc. submits this reply to the 76 comments filed in response to the Notice of Proposed Rulemaking, FCC 93-454 (Oct. 8, 1993) ("Notice").[1]

I. An Expansive Definition of "Commercial Mobile Services" is Both Appropriate and Necessary

The vast majority of commenters support the proposition that regulatory parity, consumer protection, and a fully competitive marketplace — Congress' overriding objectives in amending Section 332 of the Communications Act — will best be achieved by adoption of a broad definition of commercial mobile services ("CMS") and a correspondingly narrow definition of private mobile services ("PMS"). Consistent with this view, all but a handful of commenters agree that cellular, enhanced SMR,[2] and PCS

[1]The identity of the commenters, and the abbreviations used in this Reply, are listed in Attachment A.

[2]Even Nextel, the first company to implement enhanced SMR service, agrees that CMS status should apply to "any wide-area SMR or 'ESMR-type' systems, whether operating at 220 MHz, 800 MHz or 900 MHz." Nextel at 14 (emphasis in original).

should be classified as CMS.[3] The comments are likewise unanimous that the following applications are appropriately designated as PMS: non-profit public safety services, government mobile communications, and mobile radio services operated by a business (or businesses) solely for their own internal use.[4]

There is a greater divergence of opinion regarding the appropriate classification of a few remaining services, including paging and traditional SMR, although the prevailing sentiment is that these services also fit within the CMS category.[5] The debate over whether such services should be deemed CMS or PMS centers on two of the definitional components of CMS: "interconnected service" and "available to the public,"[6] and the "functional equivalence" test.

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[3]There is some difference of opinion regarding the appropriate treatment of possible (but undefined) not-for-profit PCS applications (although, as a practical matter, it is questionable whether with competitive bidding any PCS provider would use its license in such a manner). U S WEST does not agree with those commenters seeking to base a licensee's regulatory classification simply on its election of private carrier status for a portion of its service offering. Such an approach is inconsistent with the new statutory framework and ignores the fact that "it is the nature of the service, rather than the declared intent of the provider, that is relevant for classification purposes." MCI at 4. *See also* AMTA at 17-18. Licensees engaged in the provision of both CMS and PMS should be subject to one classification: CMS. *See* U S WEST at 23. Any other result would maintain the very regulatory disparities that Congress sought to eliminate.

[4]However, U S WEST agrees with the majority of commenters that any Part 90 licensee that (a) sells excess capacity on a for-profit basis or (b) manages a shared-use system on a for-profit basis should be regulated as a CMS provider because "these services and systems are directly substitutable for existing common carrier mobile services" and because there is "no reason to provide the licensees of such systems with regulatory advantages over common carrier licensees." Rochester at 4. *See also* AMTA at 9; Bell Atlantic at 7; CPUC at 4; DCPSC at 4; McCaw at 16; Pacific at 4; PacTel at 6; PageNet at 5; Sprint at 5; Telocator at 9.

[5]*See, e.g.,* Arch at ii; CTIA at 6; McCaw at 20, 28-29; PageNet at 12.

[6]There is little disagreement regarding the "for-profit" component of CMS. The parties generally concur that the term should encompass "any service which is provided to an un-

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A. Interconnected Service. Most commenters urge a definition of "interconnected service" that tracks the plain meaning of amended Section 332(d)(1). CTIA expresses this definition most simply in stating that an interconnected service should include any service that "allows a subscriber to send or receive messages over the public switched network."[7]

A small number of commenters contend that the term "interconnected service" should instead turn on the type of technology or network architecture a licensee employs.[8] They assert, for example, that those services using store-and-forward technology should be excluded from the "interconnected service" definition — although they do not attempt to explain just how this technology-based distinction is relevant in any way.[9]

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affiliated entity and for which compensation is received." USTA at 3 (emphasis added). *See also* BellSouth at 4-7; GCI at 1; McCaw at 16; Mtel at 5-6. In addition, it is not necessary that a licensee actually turn a profit; the relevant issue is whether profit is intended. *See, e.g.,* SBC at 5; NYNEX at 4; U S WEST at 14-16. Moreover, the parties are unanimous in the belief that the for-profit component cannot be avoided by simply offering a segment of the service on a non-profit basis. *See, e.g.,* Arch at 4-5; CTIA at 7; GTE at 5; NYDPS at 4; Nextel at 8; NYNEX at 5-6; SBC at 6; Sprint at 5; TDS at 3. Finally, as previously discussed (*see* note 4 *infra*), this would include situations where a licensee sells excess capacity on a for-profit basis.

[7]CTIA at 8-9. *See also* Bell Atlantic at 8 ("[A]ll services which enable a customer to send or receive messages to or from points in the public switched network."); McCaw at 17 ("[E]nd users can initiate and terminate communications to telephones and other devices connected to [the public switched] network."); USTA at 4 ("[T]he key factor . . . is end user accessibility" such that users can "communicate via a public network.").

[8]Most of these proponents currently provide "private" services on an unregulated basis and therefore stand to benefit from a perpetuation of the current (and disparate) regulatory environment.

[9]One commenter even takes the extreme position that paging companies "employ the PSN in an ancillary fashion" only, although this same commenter later takes the position that PSN interconnection is "critical." PageMart at 5, 10.

The vast majority of commenters reject this contention, noting that such technical distinctions would only perpetuate the very disparities Congress sought to eliminate.[10] As one commenter aptly observed:

> From a subscriber's viewpoint, the important feature of a service is whether messages can be sent to or received from points in the public switched network. How those messages are transmitted, or what technology is used, should not be the touchstone for classification.[11]

Besides, the "store-and-forward exemption" should be rejected because it would leave private carrier paging unregulated and would deregulate common carrier paging — action completely contrary to Congress' intent.[12]

B. Effectively Available to the Public. CMS classification is appropriate for any interconnected service that is "effectively available to a substantial portion of the public."[13] The vast majority of commenters agree that the Commission should apply this "effectively available" standard broadly so CMS includes "all interconnected services available to the public without

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[10] *See, e.g.*, Arch at 7-8; CTIA at 9; DCPSC at 5; MCI at 6; McCaw at 29-31; Mtel at 6-7; NABER at 9-10; NYDPS at 5-6; Nextel at 16; Pacific at 6; PacTel Paging at 5; PageNet at 5-9; Roamer One at 7; Rochester at 4; SBC at 7; Sprint at 6; Telocator at 10 n.11; USTA at 5; Vanguard at 4-5.

[11] Bell Atlantic at 9 (emphasis in original).

[12] As the Commission has acknowledged, this intent is clearly evidenced by the adoption of new Section 332(c)(2)(B), which "grandfathers existing private paging services as private mobile services for three years after enactment." Notice at 15 n.54. It is therefore obvious that Congress expects these services to be regulated as CMS.

[13] Amended Section 332(d)(1)(emphasis added).

restriction, even though a particular service may be of use to only a small percentage of the general population."[14]

A handful of commenters want the Commission to adopt a narrower CMS definition by considering such factors as specialized service offerings, system capacity, and service area limitations. Putting aside the fact that these proposals ignore the word "effectively" in the statute, consideration of such factors would represent poor public policy. For example, service area limitations would "remove incentives for private carriers to expand their service areas to meet demand,"[15] and "[c]apacity-based classifications could have the perverse result of discouraging use of spectrum efficient advances."[16] Consideration of such factors would, moreover, result in endless Commission determinations attempting to draw and redraw the "correct" line separating CMS from PMS. And regardless of where the Commission may ultimately draw this line, this arrangement would "inappropriately result in the disparate regulatory treatment of competing providers."[17]

Rather than establish (and continually refine) distinctions that have little basis in the marketplace, the Commission should instead consider all for-hire services to be "effectively available to the public" even if the licensee

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[14]McCaw at 18. *See also* Arch at 5-6; Bell Atlantic at 11; BellSouth at 13; CTIA at 10-11; GTE at 7; Geotek at 8-9; Mtel at 8; Pacific at 8; Rochester at 4-5; SBC at 14; Sprint at 8; TDS at 9-10; UTC at 11-12; Vanguard at 7.

[15]Geotek at 8-9.

[16]GTE at 7.

[17]Telocator at 11-12.

chooses to serve only a limited segment of the public.[18] Small groups of customers deserve the same CMS protections afforded to large groups of customers — that is, the right to be protected from discrimination and the right to file complaints.

Under this analysis, the Commission should designate SMR services as CMS. To do otherwise "would violate the fundamental objectives of Section 332 by leaving outside the scope of CMS numerous SMR systems which compete for customers with cellular systems and other mobile service providers."[19] In addition, the Commission "would be compelled to monitor the operations of each such SMR system, or require extensive and timely self-reporting, to ensure that it does not cross the line beyond what constitutes private service."[20]

C. Functional Equivalence. Amended Section 332(d)(3) specifies that the term "private mobile service" means any mobile service that is "not a commercial mobile service or the functional equivalent of a commercial mobile service." Moreover, Congress, as part of its objectives to ensure regulatory parity and to protect consumers, amended the PMS definition "to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service."[21]

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[18]*See, e.g.*, Arch at 5; AAR at 5; Bell Atlantic at 11; BellSouth at 5; CTIA at 10; Metricom at 6; McCaw at 18-19; NYDPS at 7; Pacific at 7-8; Sprint at 7-8.

[19]Bell Atlantic at 14-15. *See also* CTIA at 6; Pacific at 10.

[20]Bell Atlantic at 15.

[21]Conference Report at 496 (emphasis added).

Notwithstanding this unambiguous statutory language and legislative intent, a handful of commenters would like PMS interpreted expansively to include services that meet the CMS definition but supposedly are not the "functional equivalent" of CMS.[22] Not only do these proponents fail to square their position with the plain language of the statute,[23] but they also do not explain how a service meeting all the prerequisites for designation as CMS can nonetheless not be the functional equivalent of a CMS service:

> It does not make sense to refuse to label a service as commercial mobile service when it satisfies the technical definition.[24]

In addition, these proponents do not explain why carriers providing interconnected service to members of the public should be free to discriminate and free from consumer complaints when Congress made unmistakable its intent in protecting consumers and in ensuring regulatory parity. Finally, even the proponents of an expansive PMS definition concede that their position "may create unnecessary uncertainties and legalistic maneuverings."[25]

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[22]This position is rejected by the vast majority of commenters, who note correctly that services which do not fit neatly within the CMS definition may nonetheless be regulated as CMS if they are, in effect, the functional equivalent of a CMS service. *See, e.g.*, Bell Atlantic at 13-14; BellSouth at 20; CTIA at 11-16; DCPSC at 7-8; McCaw at 19-22; Mtel at 9-10; New Par at 6-8; NYNEX at 12; PacTel at 7-8; SBC at 11-14; TDS at 10-11; USTA at 6-7; Vanguard at 8-10.

[23]Under the settled law of statutory construction, resort to congressional reports is unnecessary (and inappropriate) where, as here, the statutory language is unambiguous. In contrast, the proponents of an expansive PMS definition improperly attempt to use what they claim is an ambiguity in a congressional report to change the plain meaning of the statute itself.

[24]CTIA at 14.

[25]NABER at 12.

As a related matter, a few parties argue that the Commission should consider whether a service "employs frequency or channel reuse" in analyzing whether it is the functional equivalent of CMS service.[26] There are many flaws with this position. Because frequency reuse is not a prerequisite to a CMS service, it is not apparent why frequency reuse should be a prerequisite to a service that is functionally equivalent of CMS. This is particularly the case because "different technologies are capable of providing, from the customer's perspective, similar services,"[27] and because "technologies currently exist which can offer functionally equivalent services without frequency reuse."[28]

In addition, requiring frequency reuse as a precondition to functionally-equivalent treatment "would result in functionally equivalent services being classified differently."[29] Finally, consideration of hyper-technical distinctions would represent unsound public policy because it could constrain licensees from increasing spectrum efficiency through the use of spectrum enhancing technologies like frequency reuse.[30] In summary, adoption of overly technical and narrow definitions would result in a regulatory envi-

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[26]*See* AMTA at 8; EFJ at 4. Despite the arguments to the contrary, a service can clearly meet the CMS definition (and should be regulated as such) without employing frequency reuse.

[27]NYNEX at 12.

[28]CTIA at 19. *See also* Bell Atlantic at 11; PacTel Paging at 5 n.11; SBC at 14; Telocator at 13 n.18 ("A decision on the regulatory category to assign a service cannot be based solely upon the underlying technology.").

[29]BellSouth at 8.

[30]*See, e.g.*, PRSG at 2.

ronment having an unmistakable resemblance to the very environment which Congress has sought to overhaul.

II. All CMS Providers Should Have the Flexibility to Provide to the Public a Full Range of Services, Including Dispatch, SMR and PMS Services

Congress has authorized the Commission to remove the current dispatch prohibition on common carrier mobile service (CMS) providers if "such termination will serve the public interest."[31] The comments overwhelmingly support the removal of this prohibition,[32] noting the following public interest benefits:

- The public will enjoy the benefits of increased competition — lower prices and a larger array of service options — if CMS providers begin providing dispatch services as well;[33]

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[31]*See* Amended Section 332(c)(2); Conference Report at 492 ("[T]his section authorizes the FCC to decide whether all common carriers should be able to provide dispatch service in the future."). Currently, cellular carriers are allowed to provide "switched" dispatch service only. *See* Flexible Cellular Order, 3 FCC Rcd 7033, 7043 ¶ 77 (Dec. 12, 1988), *on recon.*, 5 FCC Rcd 1138 (Feb. 28, 1990). *Compare* 47 C.F.R. § 22.519 *with* 47 C.F.R. § 22.911(d) *and with* 47 C.F.R. § 22.930. This "switched" methodology is expensive to provide. *See* PNC at 3 n.6.

[32]*See, e.g.*, Ameritech at 4 n.7; AMSC at 6-7; Arch at 9 n.21;Bell Atlantic at 17-20; BellSouth at 31-32; CTIA at 23-24; Century at 4-5; GTE at 13-14; McCaw at 21 n.57; MCI at 6-7; New Par at 14-16; NYNEX at 16; PNC at 3-4; RCA at 4; SBC at 21-25; TDS at 16-17; Telocator at 16-17; U S WEST at 24-26; UTC at 16-17.

[33]*See, e.g.*, AMSC at 7; Bell Atlantic at 18; BellSouth at 31-32; MCI at 7; New Par at 15; NYNEX at 16; RCA at 4; SBC at 25; TDS at 16; Telocator at 17; U S WEST at 24; UTC at 17.

- CMS providers will be able to offer the public an integrated package of services not available today (at least *via* CMS providers);[34]

- CMS providers will be encouraged to deploy new, capacity-enhancing technologies and to maximize the efficiency of their use of spectrum;[35] and

- Removal of the restriction would promote the Congressional intent of regulatory parity.[36]

Only one commenter, a dispatch provider, opposes removal of the dispatch prohibition. While acknowledging that there "continues to be a growing demand for low cost, reliable dispatch communications," this incumbent nonetheless opposes lifting the prohibition because, it says, CMS providers "will be able to employ excess capacity to underprice traditional SMR systems."[37]

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[34]*See, e.g.,* AMSC at 7; Bell Atlantic at 18; SBC at 25; U S WEST at 25.

[35]*See, e.g.,* GTE at 13-14; RCA at 4; Telocator at 17.

[36]*See, e.g.,* Bell Atlantic at 19; BellSouth at 31; CTIA at 24; Century at 4-5; New Par at 14-15; PNC at 3-4; U S WEST at 25. Congress made clear that dispatch providers reclassified as CMS providers should continue to have the right to provide dispatch services. *See* Conference Report at 492; House Report at 261 ("The intent of the Committee is not to disturb the ability of private carriers offering dispatch service prior to enactment from continuing to offer such service."). Consequently, unless the prohibition is removed for all CMS providers, the mobile services market will continue to contain the very sort of artificial distinctions which Congress intended to dissolve by revising Section 332.

[37]EFJ at 10 (emphasis added). This commenter is so protectionist that it even contends that current dispatch providers reclassified as CMS providers should also "be prohibited from offering dispatch service." Id. at 5, 11. This argument, however, is squarely inconsistent with the new Act. *See* note 36 *supra.*

This opposition underscores why the public interest would be served by removing the dispatch prohibition. The public interest is served by lower, rather than higher, prices. If, as this dispatch operator asserts, the public will enjoy lower prices if CMS providers were also to provide dispatch services, then the public interest would necessarily be disserved by maintaining the prohibition. It bears repeating that this Commission is charged with promoting the public's interests and not with protecting the private interests of individual competitors.

Four other dispatch providers take a more moderate view. While conceding that the prohibition must be removed, these incumbents assert that the effective date of this removal should be deferred for three years so they have time "to prepare" for the new competition.[38] However, these dispatch providers nowhere explain why they need this time, especially as they will enjoy a regulatory advantage (classification as PMS providers) during this period while new dispatch carriers will be regulated immediately as CMS providers. And of greater importance, they nowhere explain why the public should be deprived of additional choices and lower prices for three more years. These omissions make apparent that existing dispatch providers simply want to avoid facing more competition as long as possible.

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[38]AMTA at 22-23; Geotek at 4 n.7; NABER at 13; Nextel at 18-20. Completely baseless is Nextel's assertion that "[e]liminating the prohibition during this [three-year] transition would be inconsistent with the revised Act." Id. at 19. If Congress wanted this Commission to wait three years before removing the prohibition to protect current dispatch providers from new competition, it could have easily said so. Besides, if CMS provision of dispatch in 1996 is in the public interest, certainly CMS provision of dispatch in 1994 is in the public interest as well.

Given the commenters' overwhelming support for the removal of the dispatch prohibition and the strong public interest reason for allowing CMS providers to offer dispatch service, the Commission should accept Congress' invitation and permit all mobile service licensees to provide dispatch services to American consumers and businesses. The sooner the prohibition is removed, the sooner the public's interest will be served.

These same public interest considerations compel repeal of Commission Rule 90.603(c), which prohibits wireline carriers from owning SMR systems.[39] Continuation of this restriction is inconsistent with the principles of unrestricted entry and unfettered competition and undermines the directive of regulatory parity.[40] It was for these very reasons that Congress encouraged the Commission to "reexamine this restriction."[41] U S WEST therefore urges the Commission to take this recommended step.

The Commission should, moreover, take broader action so CMS providers possess the regulatory flexibility they need to satisfy the full market demand for tetherless services. Specifically, there are many specialized PCS services, such as localized health and home care services and educational applications, which may not require the provision of interconnected

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[39]The Commission long ago proposed to eliminate this SMR wireline restriction, noting that the prohibition had been adopted without any grounds having been identified and finding that wireline entry into SMR service "would provide more efficient service to the public by enhancing competition." Notice of Proposed Rulemaking, PR Docket No. 86-3, 51 Fed. Reg. 2910 (Jan. 22, 1986). Last year, however, the Commission terminated this rulemaking without explaining why the prohibition should be retained. Order, 7 FCC Rcd 4398 (1992). Reconsideration petitions were filed, but they remain pending.

[40]*See, e.g.,* Bell Atlantic at 19-20; BellSouth at 22-24; SBC at 22.

[41]House Report at 262.

services.[42] So that CMS providers can have the opportunity to serve these new, largely undeveloped and unsatisfied needs, the Commission should adopt provisions similar to those contained in Part 22 which allow cellular carriers to provide "incidental" and "ancillary" services on a secondary basis, including any PMS-type services.[43]

III. Streamlined Regulation and Parity Should be the Touchstones in Applying Title II Regulation to the Competitive CMS Market

The Commission has repeatedly determined that tariff, entry and accounting regulation not only is unnecessary in competitive markets but is actually "counterproductive" and "inhibits price competition."[44] In this regard, the commenters are nearly unanimous in their position that the mobile services market is competitive and that, as a result, maximum forbearance from Title II regulation is warranted.[45] In fact, only two com-

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[42]*See* HAI Report appended to AMT's Comments.

[43]U S WEST at 21-24.

[44]Tariff Filing Requirements for Interstate Common Carriers, 7 FCC Rcd 8072, 8073, 8079 (1992). *See also* Competitive Carrier, 77 F.C.C.2d 308, 358-59 (1979)("traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually would be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing."); Tariff Filing Requirements, 7 FCC Rcd at 8079 ("mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends"); CTIA Petition for Waiver of Part 61, 8 FCC Rcd 1412, 1413 (1993)("cost support materials might provide competitors with access to information that is completely sensitive").

[45]*See, e.g.*, AMTA at 19; AMSC at 5; Arch at 11; Bell Atlantic at 20-27; BellSouth at 26-31; CTIA at 25-39; Cencall at 5-8; Century at 5-7; Comcast at 12-15; Cox at 7-8; GTE at 14-20; McCaw at 7-11; Mtel at 13-18; Motorola at 17-19; NABER at 14-17; NTCA at 5-7; Nextel at 20-22; NYNEX at 18-21; Pacific at 16-18; PacTel at 16-17; PageMart at 13-16; PageNet at 14-24; PNC at 7; RTI at 2-5; Rochester at 6-9; RCA at 5-7; SBC at 27-29; Sprint at 11-13; TDS at 19-20; Telocator at 18-20; TWT at 5 n.3; TRW at 28-33; U S WEST at 26-29; UTC at 18-19; Vanguard at 14-15; Watercom at 8-12.

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menters, the California and New York commissions, question this position, contending instead that forbearance of monopoly-type regulation in their respective state may be "premature."[46]

Notably, the views of these two state commissions concerning the state of competition within the mobile services market are not shared by the regulatory commissions in most other states,[47] which have decided not to apply monopoly-type regulation to mobile services carriers.[48] These views also overlook the rapid growth that the mobile services market has experienced, and the declining prices consumers have enjoyed. And they ignore completely the additional entry (*e.g.*, broadband PCS, narrowband PCS, enhanced SMR, mobile satellite services) which will make the mobile services market even more competitive. Nevertheless, if either of these state com-

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The Commission, too, has noted that the mobile services market is competitive and, consistent with this view, it has not imposed tariff, entry and accounting regulation on mobile services providers. *See, e.g.,* Preemption of State Entry Regulation in the Public Land Mobile Service, 59 R.R.2d 1518, 1533-34 (1986)(subsequent history omitted); Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd 4028 (1992). This competitive state is further confirmed by the record of comments submitted in response to CTIA's January 1993 petition for rulemaking (RM-8179), and by decisions of antitrust courts. *See, e.g.,* CTS, Inc. v. NewVector Communications, 892 F.2d 62 (9th Cir. 1989); Metro Mobile v. NewVector Communications, 661 F. Supp. 1504 (D. Ariz. 1987).

[46]CPUC at 8; NYDPS at 11.

[47]*See, e.g.,* Appendix 3 to Bell Atlantic's comments.

[48]It is noteworthy that California, which regulates the cellular industry more heavily than perhaps any other state, is also the state with the highest cellular rates. *See* July 29, 1992 Affidavit of Jerry A. Hausman submitted in United States v. Western Electric Co., Civil Action No. 82-0192, at Appendix B. For example, cellular rates in Los Angeles are 48% higher than in Chicago, an unregulated market, and 31% higher, on average, than 12 other unregulated metropolitan areas, including Detroit, Washington, D.C., Dallas, Miami, Denver and Seattle. As a general rule, "price regulation does not lead to lower prices." Id. at 10. This is persuasive evidence that cellular rates are better left to marketplace forces rather than regulatory controls.

missions truly believes that the mobile services market in their respective jurisdiction is not competitive and that monopoly-type regulation is therefore necessary, they can exercise the option afforded to them by Congress: petition the Commission for authority to regulate rates in the CMS market.[49]

One fact is clear: there is no basis for applying different forbearance levels to different types of mobile services or different mobile service providers. The mobile services industry is more competitive today than at any time in the past. Yet, in the past, the Commission did not require tariffs or impose entry and accounting regulation. There is even less reason to start doing so now.[50] Indeed, that Congress granted this Commission express forbearance powers, after courts had begun questioning these powers under the pre-amended Communications Act, is powerful evidence that Congress supports the Commission's past forbearance practices.[51]

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[49]*See* Amended Section 332(c)(3)(B).

[50]The Commission should, therefore, resolve in this proceeding the issues raised in CTIA's RM-8179 rulemaking petition concerning regulatory status of cellular carriers. *See* SBC at 28 n.19. The record in that proceeding — which documents the competitive nature of the cellular industry — has been incorporated by reference into this proceeding. The Commission is therefore in a position to "declare cellular carriers to be nondominant . . . or make clear that any references in its regulations to obligations of dominant or nondominant carriers no longer pertain in any way to providers of commercial mobile services." Id. Hamstringing cellular operators with dominant carrier regulation (as suggested in one or two comments) when providers of analogous services are not similarly regulated would seriously undermine Congress' regulatory parity objectives.

[51]Moreover, the Commission can eliminate considerable uncertainty and controversy by clarifying that mobile services tariffs will no longer be accepted. Bell-affiliated CMS providers have been obligated by the MFJ Court to continue filing tariffs for their provision of equal access unless Commission rules do not permit such tariffs. *See* Bell Atlantic at 26 n.31. It is time that this Commission, rather than an antitrust court, decides when tariffs should, and should not, be filed.

A handful of commenters, while acknowledging the competitive nature of the mobile services market, nonetheless suggest that the Commission apply monopoly-type regulation to certain mobile service carriers affiliated with companies they believe are dominant.[52] None of these commenters, however, supports its claims with any market analysis (and, indeed, their claims are generally contained in one or two sentences only).[53] Indeed, these few commenters cannot even agree among themselves which carriers are supposedly dominant.[54]

In the end, these commenters simply want to hobble certain of their respective competitors by imposing new regulatory burdens that do not now exist and that the Commission has often rejected in the past.[55] In fact, the Commission just recently concluded that, given the state of the market, no

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[52]CPUC, for example, believes that this Commission "should establish accounting safeguards for dominant carriers which intend to provide PCS services." CPUC at 12. While there is absolutely no evidence on the record regarding the financial ramifications of this proposal, it can reasonably be anticipated that the imposition of the stringent accounting requirements called for by CPUC would be very costly because cellular carriers routinely operate pursuant to Generally Accepted Accounting Principles ("GAAP").

[53]The Commission has held that monopoly-type regulation like that contained in Title II is appropriate only for carriers possessing market power. Market power, the Commission has declared, requires "the ability to raise prices by restricting output." Competitive Carrier, 95 F.C.C.2d 554, 558 ¶ 7 (1983)(Fourth Report), *quoting*, P. Areeda & D. Turner, Antitrust Law 322 (1978). *See also* Competitive Carrier, First Report, 85 F.C.C.2d at 10 ¶ 26 ("We will consider a carrier to be dominant if it has market power (*i.e.*, power to control price)."); Second Report, 91 F.C.C.2d 59-60 ¶ 1 (1982)("[W]e classif[y] carriers as either dominant or nondominant depending on their power to control price in the marketplace."); Fourth Report, 95 F.C.C.2d at 558 ¶ 8 (The "consistent definition of market power focuses on the ability to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable.").

[54]*See, e.g.*, Cox at 5-6; GCI at 3; Grand at 7-8; In-Flight at 4-5; NCRA at 5; Nextel at 22-24.

[55]*See, e.g.*, Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719 (1991), *aff'd* Cellnet Communications v. FCC, 965 F.2d 1106 (1992).

separate subsidiary requirements were necessary with respect to telephone company provision of PCS services.[56]

IV. The Part 22 Interconnection Policies Should be Applied to the Entire CMS Market

Many parties agree with U S WEST that the Commission should apply its current Part 22 interconnection practices to all CMS providers.[57] This framework would provide relative certainty over the respective interconnection rights of carriers, yet would offer carriers the flexibility to negotiate specific interconnection agreements that best suit their individual needs. This built-in flexibility will be particularly useful in the PCS context where services are expected to be diverse and will evolve over time.

Others submit that the current system is not effective and, as a result, should not be extended to CMS generally.[58] Notably, this position is not shared by most carriers with experience under the current Part 22 framework, including large cellular operators not affiliated with telephone companies.[59] Moreover, none of the detractors of the current Part 22 policies contends that it has been unable to resolve interconnection disputes using the Commission's complaint process. Accordingly, U S WEST submits

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[56] New Personal Communications Services, GEN Docket 90-314, FCC 93-451. at 52 ¶ 126 (Oct. 22, 1993)(Second Report and Order).

[57] *See, e.g.*, Century at 7; GTE at 21; U S WEST at 30-32.

[58] *See, e.g.*, Comcast at 8; GCI at 4-5.

[59] *See, e.g.*, McCaw at 31 n.83; Vanguard at iii ("Vanguard also supports the Commission's proposal to grant commercial mobile service providers the same interconnection rights that apply to existing Part 22 licensees.").

that application of the existing Part 22 interconnection policies to CMS service would be the most prudent approach, especially given the Congressional deadline by which the Commission must act.

A handful of commenters contend that PMS providers are entitled to the same interconnection rights held by CMS providers — even though the amended statute expressly extends such rights to CMS providers only and even though PMS providers for the most part will not be providing an interconnected service.[60] There is less to this debate than first meets the eye. This is because Section 201 imposes on "every common carrier" (which necessarily includes CMS providers) "the duty . . . to furnish such communication service upon reasonable request," including "to establish physical connections with other carriers."[61] Like any other customer, PMS providers are free to make "reasonable requests" for interconnection.

The question, then, is whether the same standard of reasonableness should be applied to interconnection requests made by PMS providers that are applied to requests made by CMS providers. It is premature to decide this issue, given that the amended statute extends interconnection rights to CMS providers only and given that most PMS providers will not be providing interconnected service. These types of issues are better resolved in a complaint or declaratory ruling proceeding where the issue can be resolved

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[60]Amended Section 332(c)(1)(B) provides that, "[u]pon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connects with such service pursuant to section 201 of this Act."

[61]47 U.S.C. § 201(a).

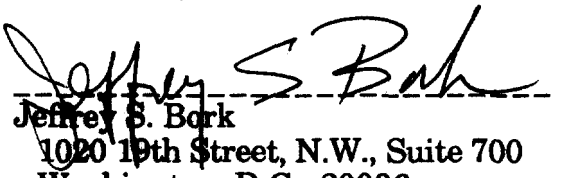
within a concrete factual setting.[62] Besides, an interconnection request may result in the PMS provider being reclassified as a CMS provider, which would moot the PMS interconnection debate altogether.

V. Conclusion

Congress amended Section 332 of the Communications Act to establish regulatory parity among all mobile services. This directive can be discharged only by classifying most mobile services, including traditional SMR and paging, as commercial mobile services.

Respectfully submitted,

U S WEST, Inc.



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November 23, 1993

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[62]Importantly, complaints or declaratory ruling petitions will be filed only if a request for interconnection is denied. It is, therefore, entirely possible that these interconnection issues will be resolved by the industry without Commission involvement.

Attachment A

List of Commenting Parties
GEN Docket No. 93-252

Abbreviation	Commenting Party
AMT/DSST	Advanced MobileComm Technologies, Inc. and Digital Spread Spectrum Technologies, Inc.
ARINC	Aeronautical Radio, Inc.
AllCity	AllCity Paging, Inc.
AMTA	American Mobile Telecommunications Association, Inc.
API	American Petroleum Institute
Ameritech	Ameritech
AMSC	AMSC Subsidiary Corporation
Arch	Arch Communications Group, Inc.
AAR	Association of American Railroads
APCO	Association of Public-Safety Communications Officials-International, Inc.
Bell Atlantic	Bell Atlantic Companies
BellSouth	BellSouth Corp.
CPUC	California Public Utilities Commission
CTIA	Cellular Telecommunications Industry Association
Celpage *et al.*	Celpage, Inc., Network USA, Denton Enterprises, Copeland Communications & Electronics, Inc., and Nationwide Paging
CenCall	CenCall Communications Corp.
Century	Century Cellunet, Inc.
Comcast	Comcast Corp.
CTP	Corporate Technology Partners
Cox	Cox Enterprises, Inc.